UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NORTHWEST, SUITE 400
WASHINGTON, D.C. 20001-8002

DATE: 03/05/97

CASE NO. 95-INA-89

In the Matter of:

HUNTINGTON HYUNDAI, INC.
Employer

on behalf of

EDIL GUARDADO
Alien

Before: Guill, Holmes and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 19, 1993, Huntington Hyundai, Inc. ("Employer") filed an application for labor certification to enable Edil Guardado ("Alien") to fill the position of "Get ready car mechanic" (AF 13). The job duties for the position, as stated on the application, are as follows:

> Inspects new cars prior to delivery to customers for scratches, dents, broken glass, cleans interior and exterior, drives car to detect motor noises and brakes, inspects all fluid levels adjusts if necessary, keeps record of car until delivery.

(AF 13).

The stated job requirement for the position is two years of experience in the job offered or in the related occupation of Auto Mechanic (AF 13).

In a Notice of Findings ("NOF") issued on May 20, 1994, the CO proposed to deny certification on the grounds, inter alia, that Employer rejected qualified U.S. applicants for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers. See 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). (AF 59-62).

Employer submitted its rebuttal on or about June 23, 1994 (AF 63-74). The CO found the rebuttal unpersuasive regarding one of the U.S. applicants (Price) and issued a Final Determination on June 29, 1994, denying certification (AF 75-77).

On July 20, 1994, Employer appealed the denial of certification (AF 78-89), and subsequently the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8).

In the report of recruitment results, Employer stated, in pertinent part:

EDMUND C. PRICE

Appeared for interview on February 1, 1994. Has experience as auto mechanic but his experience is limited to general repairs.

He has no experience in new car prepping prior to delivery to customers such as inspecting new cars for scratches, dents, broken glass, cleaning interior and exterior, nor in keeping records of car delivery.

He stated that on February 1, 1994 he received his driver's license. He has no experience in driving cars to detect motor noises and brakes.

His resume clearly indicates that he is not qualified.

(AF 44).

In the Notice of Findings, the CO stated, in pertinent part:

We note, applicant Price was a motor transport operator for the U.S. Army for 6 years. If applicant Price did not have a drivers license he would have not been able to operate motor vehicles for the U.S. Army.

Employer rejected (Price)...for not having experience in the job offered. However, employer list(ed) a related occupation of Auto Mechanic and any applicant with 2 years experience as an Auto Mechanic is qualified for the position offered...Price possess(es) a minimum of 2 years experience in the related occupation of Auto Mechanic and (is) qualified for the position offered through the related occupation.

(AF 60).

Accordingly, the CO directed the Employer to document lawful, job-related reasons for rejecting U.S. applicant Price (AF 59).

Employer's rebuttal consists of a letter by its counsel who stated that Mr. Price was interviewed, but he "completely ignored" Employer's request "to bring with him letters from his prior employment stating his specific job duties." Furthermore, "he clearly and unequivocally demonstrated a lack of knowledge with numerous engine and mechanical parts." Accordingly, Employer's counsel concluded that despite Mr. Price's "impressive" resume, "his lack of following employer's request for letters from past employment for verification of employment and his actual lack of many repair situations convinced the employer that Mr. Price was in fact not qualified for either the position offered or the related occupation." (AF 72-74).

In the Final Determination, the CO noted: 1. the rebuttal information was submitted by the attorney of record; 2. Employer had not listed "reference letters" as a requirement on the application for certification, posting or ads; 3. the allegation that Mr. Price lacks knowledge of

"repair situations" is unclear; and, 4. "(I)t is not clear or comprehensible that an applicant (Mr. Price) with technical training in automotive technology and three years of experience as an auto mechanic would be unable to detect motor noises and brakes and have no knowledge of 'repair situation.' Accordingly, the CO concluded that "Applicant Price is qualified for the job offered through the related occupation and employer has not successfully documented lawful job-related reasons for rejecting this applicant." (AF 75-76).

We agree. Furthermore, we find Employer's reliance on such legal precedent as Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410 (5th Cir. 1989) to be misplaced. (AF 87-88). In Ashbrook, the Court held that the Department of Labor cannot properly narrow its inquiry to the single question of whether the U.S. applicant has a certain number of years of education, training, or experience. The statutory scheme and the administrative responsibility require us to consider all relevant information on the application, including the job duties listed by Employer.

Having carefully considered the entire application, we first note that the Alien lacked any experience in the stated job duties prior to being hired by Huntington Jeep Eagle, Inc., whose address is identical to that of the Employer, Huntington Hyundai, Inc. Furthermore, the Alien only worked for Huntington Jeep Eagle for approximately 9 months before being transferred to Huntington Hyundai (AF 10). It is apparent for that reason that the Employer included "2 years as Auto Mechanic" as an alternative job requirement (AF 13). In addition, we note the inconsistencies in Employer's purported bases for rejecting U.S. applicant Price. As outlined above, Employer initially stated that he rejected Mr. Price because he lacked experience prepping cars prior to delivery and because he had no driving experience to detect motor noises and brakes (AF 44). However, on rebuttal, Employer's counsel stated that the U.S. applicant failed to provide written references and lacked knowledge in matters related to repair situations (AF 72-73).

It is well settled that assertions by counsel that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. See, e.g., Moda Linea, Inc., 90-INA-425 (Dec. 11, 1991). In the present case, the record lacks such underlying support. Furthermore, as stated above, the purported bases for rejecting the U.S. applicant has changed. Moreover, the Employer's reliance on vague and subjective statements, such as lack of knowledge of repair situations, must be strictly scrutinized. Baosu International, Inc., 89-INA-38 (Oct. 30, 1989).

For the foregoing reasons, we find that Employer failed to adequately document that it rejected U.S. applicant Price for lawful, job-related reasons. Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel

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Todd R. Smyth, Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.